WATER ALLOCATION PROGRAM DEVELOPMENT
WATER RIGHTS SUBCOMMITTEE MEETING

MEETING PROCEEDINGS
October 31, 2002

Members Present:
Terrence Tierney*
Dale Thompson*
Caroline Karp
Ken Payne
Jon Schock
Gregory Schultz
John Spirito

WRB Staff Present:
Kathleen Crawley
Connie McGreavy

Members Absent:
Kendra Beaver
Fred Crosby
Christopher D'Ovidio**
Mary Ellen McCabe
Rebecca Partington**

Students:
Jennifer Henman
Katherine Wallace
Michael Walther
Heidi Wendt

**representative of lead organizations*
***will be starting in November*

I. CALL TO ORDER
With a quorum present, Prof. Thompson called the meeting to order at 2:10 P.M.

II. APPROVAL OF MINUTES
Prof. Thompson deferred approval of the minutes until the December meeting.

III. ITEMS FOR ACTION
Ms. McGreavy stated that the Narragansett and Pequot Indian Tribes need to be contacted, and Mr. Tierney offered to speak to the tribes' attorneys.

IV. ITEMS FOR DISCUSSION

A. Report on the State of the Common Law of Rhode Island for Groundwater and Surface Water
Professor Thompson acknowledged that his students who were working on the state of common law in Rhode Island were not present. However, he would summarize surface water law. Prof. Thompson started by noting that since Rhode Island was a small state with previously no significant history of water shortages, there was little common law on surface water or groundwater. He explained that in 1827 with the Tyler v. Wilkinson case, Rhode Island transitioned from the Natural Flow Doctrine to the Reasonable Use Doctrine. The language of the decision incorporates both doctrines, stating that natural flow involves some use within reason and that some reasonable uses are not permitted as they disturb natural flow. Some commentators cite the case as the first mention of reasonable use, while others cite it as a natural flow case. Commentators note that there is confusion. Prof. Thompson then brought up the question of whether the Committee should clarify Rhode Island's laws. Under the Natural Flow Doctrine, any riparian has the right to natural flow. This prohibits diversions for consumptive use (not domestic

use) since such use interferes with natural flow. Rhode Island has essentially been operating under the Reasonable Use Doctrine since 1827 although the case law is not very clear. While Prof. Thompson pointed out that a RI Department of Environmental Management (DEM) lawyer claimed that Rhode Island was operating under the Natural Flow Doctrine, he does not anticipate any [private property} takings claims if the laws were clarified. The state has essentially been operating under the Reasonable Use Doctrine.

Prof. Karp introduced a proviso, stating that there is an advisory committee opinion from the Office of the Attorney General written in the late 1980s at the request of the Audubon Society of Rhode Island regarding the Queens River. It was an opinion about the application of the Public Trust Doctrine to non-navigable rivers. Since Tyler v. Wilkinson addressed large, navigable rivers, a clarification of the law might lead to conflicts among smaller rivers that still operate under the original common law. Prof. Karp said that she would share this opinion with Prof. Thompson. Prof. Thompson reminded attendees that the Public Trust Doctrine obligates the state to protect its waters (or at least navigable streams) and their public trust interests extending to environmental aspects. Therefore regulations can be developed and rights redefined based upon the Public Trust Doctrine and its ongoing applications. Prof. Karp added that these rights could only be redefined through the legislature for the benefit of the people. Further, rights of the people could never be conveyed away in perpetuity. Prof. Thompson clarified that these rights can be conveyed away in small portions, citing an Illinois case.

In response to a question, Prof. Thompson reiterated that the legal precedent in Rhode Island is derived from Tyler v. Wilkinson. As this is the first case transitioning to a Reasonable Use Doctrine, the language is a bit ambiguous. Later, other states more clearly adopted a Reasonable Use Doctrine. Prof. Karp expressed hesitation towards "nibbling away" at the Public Trust Doctrine in terms of water rights by carving out exceptions, citing the Palazzolo takings case (US Supreme Court).

Ms. McGreavy asked the Committee whether it wished to clarify the law. Prof. Thompson, again, cited the DEM document stating Rhode Island is under natural flow and that this may lead to some trouble. Prof. Karp then asked a question regarding free flow tributaries in Rhode Island, adding that there is an effort on behalf of the Federal Energy Regulatory Commission to restore free flow to segments of rivers for species' habitat. Prof. Karp asked how free flow tributaries would be impacted if we adopted reasonable use as opposed to natural flow? Prof. Thompson countered that other states under the Reasonable Use Doctrine still have Wild and Scenic Rivers legislation that protects free flow. He does not see such a conflict in Rhode Island and said that the state can still set standards to protect flow. He clarified that reasonable use enables more different types of uses, but it is possible to overlay Public Trust Doctrine policies requiring minimum flow. Prof. Karp suggested language that calls for reasonable use subject to the Public Trust Doctrine.

Mr. Tierney asked whether a court opinion should clarify these doctrines. Prof. Thompson said that the court could sufficiently clarify these subtle changes in common law that should not lead to takings cases. Mr. Tierney added that taking the legislative route could result in an outcome over which no one has control. Prof. Thompson reiterated that most states have been operating under the Reasonable Use Doctrine for 175 years and that it is largely unchallenged. Mr. Payne stated that an advantage of

going to the General Assembly is that it can change the law to what it should be, whereas the court can only state what the law is. It thus may be better to use the legislature.

Prof. Karp pointed out that the water use figures that she had prepared showed that hydroelectric use—probably from Ocean State Power—is among the largest withdrawals in the state. These withdrawals, though already regulated, should be controlled within the larger context of the entire system of ground and surface water. Hydroelectric use of approximately 350 mgd (million gallons per day) is apparently deemed a reasonable use, but this should not be allowed during low flow periods so that a certain amount of release remains. Mr. Schultz clarified that DEM does not consider reasonable use in terms of how other users are affected, but rather in terms of how the environment is affected. DEM regulates flow after the point that it is affecting the environment. Mr. Schultz felt that there is a niche for the RI Water Resources Board (WRB) to regulate water withdrawal from the aspect of managing a resource for a non-environmental reason. He noted that the water supply management statute (§46.15) provides a basis for drafting regulations now, whereas the courts would have to wait for a controversy.

Prof. Karp cited California law as an example of Reasonable Use Doctrine subject to the Public Trust Doctrine. Mr. Schultz stated that DEM and the RI Department of Health (DOH) are already regulating water use in Rhode Island. As long as the regulations rationally relate to the agency creating them, he believes that the WRB can make regulations since it has a broad mandate.

Ms. McGreavy mentioned a conversation with land use attorney, Paul Ryan, an expert in riparian rights who commented that water law in Rhode Island is muddled. Mr. Ryan acknowledged that the most practicable solution for lawyers might be to settle agreements rather than go to trial since there is no clear precedent in determining water rights. This is not the case in states such as California and Texas that have more case law. Thus, there needs to be further clarification. Prof. Thompson said that any reasonable use case is difficult to litigate; clarification would not necessarily help. Therefore, regulations from the WRB specifying which users should get priority may be more helpful than legal clarification of what reasonable use actually is. Mr. Payne indicated that it will be necessary to revisit the issue in order to solve it and such resolution could be considered an output of this subcommittee. Prof. Karp suggested writing a law review and getting a scholarly opinion. She cited a law review from about five years ago that predicted a merger of riparian use and prior appropriations doctrines in this region and that it is possible to solve conflicts by determining who has priority of rights. Prof. Thompson stated that the Committee needs to determine which are the more reasonable uses in times of shortage. We can attempt to define a "taxonomy of reasonableness" and we may want to do this in terms of a regulated riparian system. Ms. Crawley mentioned that the Priority Uses Committee would also be considering this issue. State Guide Plan elements already address some of this.

Ms. McGreavy added that Paul Ryan also mentioned it is problematic to litigate cases where water rights have been deeded, and that it might be prudent to build in a waiver of existing rights. Mr. Schultz stated that Aquidneck Reservoir Company owns deeded flowage rights to Tiogue Lake and asked Mr. Tierney whether these rights are recognized separately from land rights in Rhode Island. Mr. Tierney was not certain. Prof. Karp stated that it is important to flag this issue. Ms. McGreavy asked Prof. Thompson to reiterate his explanation from the last meeting. He stated that in some states' riparian systems, it is possible to separate riparian rights from land rights but that this depends

upon the definition of reasonable used that is being applied. He cited a 1980 Georgia case that allowed a user to lease riparian rights in order to pump water off the property. He said that one issue to owning the rights to the bottom of a lake is whether it is navigable and, thus, subject to the Public Trust Doctrine. Mr. Schultz said that in the case of a reservoir, it is possible to own the land if it was upland before damming. Mr. Thompson agreed and added that the Public Trust Doctrine is very powerful and tricky because it can be changed. Prior investments do not necessarily justify upholding previous rights. At the same time, states do not want to change these rights too often. Prof. Karp asserted that it would be important to know whether flowage rights are separate from land rights.

Prof. Karp indicated that daily domestic and industrial consumption account for 112 mgd of withdrawals. It seems that it is currently possible to deliver and use well water wherever the owner wishes and that it does not have to stay on the property. When Ms. McGreavy asked whether exportation was allowed, Prof. Thompson said that this depended upon the clarification of the doctrines. Prof. Karp and Ms. Crawley said that these are big issues for the Pawcatuck and Blackstone basins. Ms. Crawley said that it was very difficult in the Blackstone to determine self-supply amounts, and that it is often derived from wastewater quantities.

B. Report on the "Taxonomy of Current Water Uses/User Classes within Rhode Island," to Identify Current Conflicts

Prof. Karp introduced a diagram that she had created illustrating inputs, outputs, and contaminants to water supply and how the supply is managed. She stated that there was not much "return flow" indicated in the US Geological Survey (USGS) data. The amount that is returning is from sewage treatment plants, recharge and runoff from rivers, irrigation return flow, and septic system recharge, though these are not measured in the USGS data. The only return flow that is measured is that of livestock ponds. Prof. Karp felt that it is necessary to know how much of this supply is polluted. In her chart, she indicated that DEM and the US EPA have the primary responsibility of regulating pollutants. In Massachusetts, the Department of Environmental Protection is responsible. Prof. Karp believes that septic systems are not being regulated well, and that up to 80% of groundwater could be threatened by nonpoint source pollution. The state does not have perfect regulatory control over private use and private property. At some levels, the municipalities have better control.

On the withdrawal side, Prof. Karp looked at the categories of users in the USGS data. Ms. Crawley clarified that about 60% of public water supply in the state is provided from the Scituate Reservoir and that 88% of households get their water from major public water suppliers. Prof. Karp said that the data indicated that 98 mgd of surface water from public water supplies is consumed per day, and she tried to imagine how this water is used. Ms. Crawley added that there is a minimum flow requirement out of the Scituate to supply the Pawtuxet River. There was confusion as to the exact amount of this requirement, but Mr. Schock indicated that it would be pre-treatment quantities. Mr. Spirito stated that this flow requirement came about in order to satisfy the mill owners. He added that some mills still use water for other reasons, and that this requirement dates back to the 1915 law establishing the Scituate Reservoir when Warwick, Cranston, and other municipalities had water "outflow" built into the law. Mr. Tierney and Prof. Karp felt that it was necessary to revisit the law. Mr. Tierney affirmed that Cranston would violate its RI Pollution Discharge Elimination System (RIPDES) permit without the Scituate Reservoir outflow.

Questions were raised regarding what uses fell under the USGS self-supply category. Mr. Spirito stated that DOH regulates the water quality, not quantity, of restaurants self-supplying water. Mr. Spirito and Mr. Schultz agreed that no agency was regulating the quantity of self-supply, or how consumption affected the watershed and other users. Ms. McGreavy acknowledged this gap. Prof. Karp stated that she had created the diagram in order to recognize such gaps and opportunities for identifying the best entities to regulate the gaps. She said that wastewater management districts might provide an approximation of per capita use. Towns monitoring the frequency of septic system pumping could also provide approximations of per capita water use. Prof. Karp identified a need to identify and regulate users who are contaminating water supply. She also stated that there is conflict among users when supply is limited during drought years and, therefore, the Committee needs to determine how to regulate supply. Mr. Spirito agreed that no entity is currently monitoring withdrawals unless separate minimum flow standards exist, and that it is possible to develop rules to address this need. Ms. Crawley said that in addition to currently available information, more detailed studies will become available in five or six months for the Blackstone, Pawcatuck, and Block Island watersheds.

Prof. Karp stated that it is the responsibility of the Water Rights Subcommittee to determine who is in the position to govern water withdrawals. Mr. Schultz stated that DEM regulates RIPDES storm water permits and related water quality issues. Prof. Karp contended that regulation of contaminants does not address the need to regulate withdrawals. Mr. Spirito stated that, in times of drought, the larger water suppliers implement various degrees of conservation. Therefore, they have some influence over how water is used. Prof. Karp asked whether the Public Utilities Commission (PUC) could influence withdrawal. Ms. Crawley stated that only seven water suppliers are regulated by the PUC: Providence Water Supply Board, Kent County Water Authority, Pawtucket Water Supply Board, Woonsocket Water Dept., Newport Water Works, Prudence Island Utility Corporation, and United Water Rhode Island. Ms. McGreavy clarified that the basis for the PUC regulation is that these suppliers sell water to more than one community. Bristol County Water Authority is an anomaly because it was originally regulated by the PUC; through legislation, it is no longer regulated. Mr. Schultz asked Mr. Spirito what the PUC actually regulated. He responded that PUC regulates water rates and service. {Drinking} water quality is regulated by DOH. The PUC can regulate water distribution, but only among the regulated suppliers. Mr. Spirito stated that the PUC does not allow water suppliers to shut off water supply to entire towns.

Mr. Spirito affirmed that distributors could levy conservation rates in times of short supply. He said that there is a statute declaring that declining block rates are not conducive to sound water supply management. The seven regulated water suppliers provide the majority of public water in the state. Ms. Crawley added that these seven are also required by law to submit water supply system management plans and are, thus, subject to the rules and regulations of the WRB. Prof. Karp suggested requiring conservation all of the time rather than only during drought. She suggested creating a separate drought section requiring conservation in addition to the required emergency section that lists tiered reductions in supply.

Mr. Spirito stated that there is no penalty for those with private wells disobeying outdoor water bans. Ms. Karp and others thought that one solution could be to give the WRB authority over groundwater so that they may regulate private wells. Mr. Spirito asked

Prof. Karp why she was interested in regulating or limiting private well withdrawals. Prof. Karp clarified that she did not want to stop well withdrawals—she only wanted an agency to have legal authority over them in times of drought. Ms. McGreavy added that residential water use totals approximately 55% of consumption in the state. Ms. Wallace explained that approximately 90% of domestic water use comes from public supplies. Domestic use accounted for approximately 65% of public water supply consumption.

Prof. Karp cited the example of the Chipuxet sub-basin in South Kingstown that supplied water to private wells and public suppliers. She said that it was necessary to know the amount of private well use in this area. Mr. Spirito added that it would also be necessary to know the amount of water in the aquifer. Ms. Crawley stated that the current studies would determine this. Though it is not practical to meter every well, Ms. Crawley and Prof. Karp said that it is relatively easy to estimate per capita household water use. Mr. Schock reiterated that in times of shortages, when there are competing users, only the public water suppliers are being regulated. He asked *how* private withdrawals should be regulated. Ms. McGreavy said that one consideration is whether private users *should* be regulated, and if so whether this should be on a statewide or regional level.

i) Commentary on the Interaction of Growth and Water Management Policies

Prof. Thompson asked whether Ms. Wallace had begun to research growth management policies in other states during the coming months. Ms. Crawley identified the initiative to promote compact development in Rhode Island and the need to determine the best locations for such development. Ms. McGreavy provided the example of how the town of Richmond approached the WRB seeking advice on where to cite a mixed-used development. The Board will be better prepared to answer such questions when the water use studies are complete. She added that the Impact Committee is also considering growth issues.

Mr. Spirito asked how it was possible to know if there would be water when drilling a well. Ms. Crawley responded that this was determined through soil percolation tests. Ms. Crawley stated that it is possible to deny a building permit if no water is available, but Ms. McGreavy added that this did not happen often and it is difficult to deny building permits based on water availability. Ms. Crawley noted that it is a lot-by-lot or subdivision-by-subdivision decision. The USGS or a private consultant could be hired in order to determine if there is adequate water supply. Mr. Spirito stated that there are contractual obligations between developers and homebuyers regarding the existence of water.

Professor Thompson suggested setting up rules for exchanges in water uses. There could be an agreement between previous users and new water users to transfer water rights as a growth management measure. Mr. Schultz asked whether the Subdivision Enabling Act placed the burden on developers to prove the availability of water. Ms. Crawley stated that local land use is the jurisdiction of the municipalities as regulated by the state. Technically the police power belongs to the state unless otherwise delegated. Prof. Karp said that it would be preferable to require developers to prove to the state, rather than municipalities, that adequate water supply exist. Ms. Crawley said that this was an issue worth revisiting and that municipalities wanted, but were unable to consider, resource availability on a broader level.

Mr. Spirito told how one must receive approval from the Portsmouth Water District before building a home in Portsmouth. Ms. McGreavy stated that this occurs in other communities as well, but that conflict can erupt over how much capacity actually exists. Mr. Schock described how subdivision reviews consider whether there is adequate capacity. The building permit requires proof of a potable water supply and a wastewater disposal system either through an ISDS (Individual Sewage Disposal System) or a public sewer system. Subdivisions in outlying areas are more problematic because they require soil suitability studies without attention to groundwater. If the developer can prove that there is potable water but the well runs dry, it is between the developer and the homeowner. Mr. Schultz said that this would eventually place pressure on the town to provide public water supply to all. Prof. Karp noted that there are many municipalities in the south and west that have private wells. Other communities, such as North Kingstown, look to additional public water supply from the west. Ms. McGreavy said that it would be necessary to look at community comprehensive plans in order to determine growth projections. Growth centers will require amendments to the State Guide Plan providing for growth centers at the local level. Communities will have to amend comprehensive plans and thus shift zoning laws to be consistent. At the same time, water supply system management plans must also be consistent with comprehensive plans. This coordination can lead to a shift that ties together growth and water supply.

Prof. Karp stated that gaps still exist, and provided the example of how North Kingstown sites its compact developments on its borders. She also questioned who regulated water consumption of turf farms and stated that it is necessary to know and regulate these uses. Ms. Crawley added that agriculture is a small water consumer on the state level though very significant in some regions such as the Wood-Pawcatuck watershed. Ms. McGreavy stated the need to recognize, and further clarify, "unaccounted for" water. Ms. Crawley ended by saying that many questions stem back to what is "reasonable use".

C. Report on Transitions in Water Law and Takings Challenges

Prof. Thompson referenced a document he had prepared explaining what occurs when water law is amended. Sometimes takings challenges occur, and one way to avoid such challenges is to only modify water rights slightly. It is also possible to modify policy so that it fits existing concepts. Rhode Island shifted from the Natural Flow Doctrine to reasonable use almost exclusively through the state Supreme Court during the mill era. There were very few challenges; more challenges occurred in western states that transitioned from riparian rights to prior appropriations. Unexercised riparian rights were a problem and trumped water appropriators. Some states statutorily abolished unexercised rights; some states tried to do this but the action was declared unconstitutional. Prof. Thompson said that it would be possible to allocate priorities under the Reasonable Use Doctrine, but that he was not sure how this would apply to groundwater. Prof. Karp noted that riparian rights differ between the East and West. She felt that it would be difficult to completely abandon the riparian rights doctrine because riparians would not want to relinquish their rights. Prof. Thompson clarified that he is trying to justify a registration system, not get rid of riparian rights. Questions would surface as to which uses could be restricted. Prof. Karp suggested looking at case law in order to establish priorities rather than reinventing doctrines.

Mr. Schultz said that the state had the right to regulate riparian rights, but if it took the entire right to the riparian use, than this would be considered a takings case. If the state was only regulating domestic use, than this would be possible and accomplish a significant amount. However, as was the case with wetlands law, takings challenges should be expected. Prof. Thompson and Prof. Karp agreed that mixed appropriations do not apply to Rhode Island as they apply in western states. Prof. Thompson added that he was simply trying to use western states' actions as examples to illustrate how regulations and priority systems can be justified through the Reasonable Use Doctrine. This can be accomplished on a watershed basis by illustrating the impacts to the system if water falls below a certain level in order to justify a priority system—the final goal. Ms. McGreavy added that Connecticut and Texas are implementing water allocation on a watershed basis.

Mr. Tierney again questioned whether it made more sense to accomplish these changes through statutes or agency regulations. Prof. Thompson said that California had extremely broad qualitative and quantitative jurisdiction as a regulatory agency. Prof. Thompson reiterated that it would be nice if the laws were clearer, but that no user had the right to a certain quantity of water unless the user has a private supply. Instead, users simply have the right to use water. Rights are limited by these doctrines, and this committee needs to determine, if and how, we are interfering with prior rights. He doubts that many users would challenge the loss of natural flow rights. Ms. Crawley and Prof. Karp disagreed with this. Prof. Thompson said that he was concerned that challenges could come from the vagueness of the doctrines, so the doctrines must be clarified. Prof. Thompson stated that it is not necessary to develop new legislation; we just need to make sure that setting priorities is consistent with current laws. Prof. Karp asked why there could be takings issues during drought periods. She also asked whether water rights can be conveyed, and Ms. McGreavy said that other subcommittees are considering this.

D. Identification of Potential Legislation to Clarify Water Rights in Rhode Island
This topic was incorporated into previous discussions.

E. Discussion of Other Goals and Challenges
Prof. Thompson stated that he would further explore the groundwater rights issue. Prof. Karp added that she would continue to analyze the USGS water consumption data and that she and Ms. Crawley would further study the contaminants portion of this issue. Prof. Thompson asked for further clarification regarding ground and surface water use. Prof. Karp said that she would look at the 1990 Arthur D. Little Study, Water Use in Rhode Island. Ms. McGreavy mentioned that it might be possible to pilot the New England Water Use Data System (NEWUDS) database that categorizes water use.

Mr. Spirito stated that there were no statutes requiring water rates to include conservation measures. Prof. Thompson asked if conservation pricing was prohibited. Mr. Spirito explained that during droughts water suppliers still have fixed expenses so when water use is limited, the suppliers can request permission from the PUC to levy emergency rates that, in effect, equal a surcharge. However, the suppliers must prove that a shortage exists. Prof. Karp noted that a statute exists stating that there should be inclining block rates in order to promote conservation. These rates may not be enforced in order to allow for economic development. Mr. Schock countered that, as a public service, water suppliers cannot justify overpricing water. Prof. Karp argued that if they are selling a public good, then they had a duty to price it in a way that conserves it, since it is in the public's interest to conserve the resource at all costs. They should not operate as if water

was merely a commodity.

Mr. Spirito contended that the Providence Water Supply Board has excess water and asked why they should institute conservation prices. Prof. Karp said that the water would otherwise be flowing through a natural system and is not simply a commodity. Mr. Schock said that water was a social issue, rather than a conservation issue and that pricing would not have an impact since consumers would pay more. Prof. Karp said that those watering their lawns should pay more to water grass in times of drought since it was not necessary. Mr. Schock once again stated that he could not charge more for water. Prof. Thompson suggested levying an environmental surcharge on domestic and other water uses during drought periods. It is necessary to consider which uses to cut back on during periods of shortage.

V. OTHER BUSINESS

Ms. McGreavy stated that the purpose of the November 22, 2002 Water Allocation Program Advisory Committee meeting was for the subcommittees to come together and share what they have learned. Other than scheduling the next meeting for Dec. 05, 2002 at 2PM (WRB office), no other business was discussed.

VI. ADJOURNMENT

On a motion by Prof. Thompson, seconded by Mr. Schultz, the meeting adjourned at 4:10PM.

Respectfully submitted,

KatherineWallace Brown University	Connie McGreavy RI Water Resources Board

**Note: For more information on this committee or the Water Allocation Program, visit:*
http://www.seagrant.gso.uri.edu/scc/wrb/index.htm